JD–03–15
Cleveland, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ACE HEATING AND AIR CONDITIONING
COMPANY, INC.

and

Cases 8–CA–133965
8–CA–133967
8–CA–133968
8–RC–127213

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33

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Seth P. Briskin, Esq., (Meyers Roman, Friedberg & Lewis, Cleveland, Ohio),
for the Respondent.
Eli Baccus, Esq., (Widman & Franklin, LLC, Toledo, Ohio),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Cleveland, Ohio on December 8 and 9, 2014. Sheet Metal Workers International Association Local Union No. 33 (the Union) filed the charges in this matter on August 4, 2014. The Regional Director issued the complaint on September 30, 2014 and consolidated the unfair labor practice cases with the Union's objections to conduct affecting the results of the May 21, 2014 representation election.

The results of that election were that 4 votes were cast in favor of the Charging Party Union and 4 were cast against. The vote of foreman Ed Dudek was challenged by the Board Agent, since Respondent did not include him on the list of employees eligible to vote, G.C. Exh. 2(f), page 3 of the hearing officer's report. A hearing was conducted on the challenge. The Hearing Officer found that Dudek was a statutory supervisor pursuant to Section 2(11) of the Act. No exceptions were filed to the Hearing Officer's Report. Therefore, the Union did not win a majority of the votes cast and was not certified as the bargaining representative of Respondent's employees.

The essence of the complaint and the Union's objections are as follows:

1) Respondent, by Ed Dudek, at the direction of Respondent's Owner, Mitchell Stephen, threatened employees that Respondent would close if they voted for union representation.
2) Dudek, at Stephen's direction, told employees that Respondent would pay them in exchange for their voting against union representation.

3) Dudek interrogated employees about their union sympathies and how they would vote.

In addition to the unfair labor practices that mirror the Union's objections, the General Counsel also alleges that Respondent violated the Act in denying employees a scheduled pay increase about a week after the representation election.

Respondent's defense is essentially that Dudek was acting as an agent of the Charging Party Union, not as an agent of Respondent, during the relevant time period, April 18-May 21, 2014.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel and the oral closing argument of the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, installs and services heating, ventilation and air conditioning systems in the Cleveland, Ohio area. It annually purchases and receives at its Cleveland, Ohio facility goods valued in excess of $50,000 directly from points outside of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

David Coleman, a union organizer, met with several employees of Respondent on Friday, April 18, 2014. The following Monday, April 21, he met a group of these employees at the beginning of their workday at the Shoreway Lofts project in Cleveland and distributed union authorization cards.[2] 6 of the 8 bargaining unit employees signed an authorization card. Another, Steve Sarosy, signed a card later that morning. Foreman/Supervisor Ed Dudek also signed an authorization card, Tr. 48, 293. The only unit member who did not sign an authorization card was Charles Ashton, who normally did service work with owner Mitchell Stephen. The employees who signed authorization cards did almost exclusively installation work. The installation crew was supervised by Dudek.

Organizer Coleman went to Respondent's office on the afternoon of April 21 and presented a letter to Respondent's owner, Mitchell Stephen. Coleman asked for voluntary

[1] The transcript contains a number of errors. Two that I note are the following:
Tr. 465, line 5 should read, "saucy goose, saucy gander."
Tr. 472, line 2, should read, "April 21."

[2] The Shoreway Lofts project involved the conversion of a warehouse into apartments or condominiums.

recognition of the Union as the representative of Respondent's full time installers and service technicians. Stephen told Coleman that he needed to consult with an attorney. On the evening of April 21, Dudek called Coleman. He reported that Mitchell Stephen had asked Dudek which employees had signed authorization cards. Dudek told Coleman that he reported to Stephen that all the employees (or all the installers) had signed a card.

On April 24, 2014, the Union filed a petition to represent Respondent's installers and service technicians. On that date Organizer Coleman met with employees at the Shoreway jobsite. Stephen arrived and he and Coleman had a brief discussion. Stephen accused Coleman of trying to steal his employees. Coleman told him that was incorrect; that the Union wanted recognition and wanted Respondent to negotiate a collective bargaining agreement with it. Stephen responded that his employees could choose to be union, but Ace Heating was not going to be a union company.

Stephen did not talk to employees directly about the union organization campaign. He did not, so far as this record shows, conduct a campaign to oppose the Union—except arguably through Dudek.

The election was scheduled for May 21. One week prior, on Wednesday, May 14, Dudek, at the Shoreway Lofts project, was handing out paychecks to installers Joe Huckoby, Noble Hall, Brian Orocz and Chris Sikora at the end of their workday. While doing so, Dudek said that at the direction of Mitch Stephen, he was informing these employees that Respondent would close its doors if they voted for union representation. There was no discussion about this alleged threat amongst the employees and none of them asked Stephen about it.[3]

Installers James Mazzeo and Steve Sirosy were apparently no longer working at Shoreway Lofts on this date. Stephen denies giving any such instructions to Dudek. Since I do not find Dudek any more credible than Stephen, I do not find that Stephen authorized Dudek to threaten employees with job loss if they voted for union representation.[4]

Dudek testified that Stephen told him to pass this message along to employees on at least 5 occasions, and that he did so. However, the record is quite clear that Dudek transmitted this message only once.[5]

[3] Three years earlier, Brian Orocz went to Mitchell Stephen when he heard similar rumors.

[4] Dudek's motivation is quite curious. He made the statement in question only to those employees who appear to have supported the Union. Since he favored union representation, it is difficult to understand why he would pass such a statement along, even if Stephen did tell him to threaten employees. Respondent's suggestion in its closing argument that this was part of a back-up plan for filing objections if the Union lost the election, is not farfetched.

[5] Service Technician Charles Ashton did tell employees that they would lose their jobs if they voted for union representation. However, there is no allegation that Ashton was an agent of the Respondent. As of the December 8-9 hearing, only Chris Sikora, of the openly pro-union employees, appears to have been still working for Respondent. Huckoby and Orocz were terminated and Hall was laid-off.

Forman Dudek also testified that on May 21, he interrogated installer Fred Corbin as to how he was going to vote. There is no corroboration for this testimony and I do not credit it.[6] Moreover, if Dudek did interrogate Corbin, he did not necessarily do so as an agent of Respondent. Dudek may also have asked Jimmy Mazzeo how he intended to vote.

Dudek kept in contact with organizer Coleman throughout the critical period between the filing for representation on April 24 and the election on May 21. The record contains text messages between Dudek and Coleman on April 30 and May 7, 2014.

Foreman Dudek also testified that Stephen told him he would pay employees to vote No in the representation election. Stephen denies this. I do not find Dudek sufficiently more credible than Stephen to credit his testimony.

Dudek told installer Jimmy Mazzeo that Stephen would pay employees to vote against union representation. Dudek did not say this to any other employees.[7] Respondent gave raises to installers Fred Corbin and Steve Sirosy after the election. Sirosy at one time expressed support for the Union but publically changed his mind before the election. There is no evidence that Corbin and Sirosy were promised raises prior to May 21.

About a week after the May 21 election, apparently after the Union filed objections to conduct affecting the results of the election, Mitchell Stephen told Jimmy Mazzeo that he had planned to give employees raises but was going to hold off until the representation issues were completely resolved.

Analysis

Was Ed Dudek an agent of Respondent in making statements that violate Section 8(a)(1) of the National Labor Relations Act?

The Board applies common law agency principles in determining who is an agent under the Act. When applied to labor relations, agency principles must also be broadly construed in light of the legislative policies embedded in the Act. A party may be bound by the conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified. *Atelier Condominium & Cooper Square Realty,* 361 NLRB No. 111 (November 26, 2014), slip op. p. 36. *Braun Electric Co.,* 324 NLRB 1, 2 (1997), *Dorothy Shamrock Coal Co.,* 279 NLRB 1298, 1299 (1986).[8] Statements of a supervisor or agent may be imputed to an employer even if that employer was not aware that the statements were made, *Jays Foods, Inc. v. NLRB,* 573 F.2d 438 (7th Cir. 1978).

[6] I also decline to credit Dudek's testimony at Tr. 90 that in April he told employees that Mitch Stephen told him to tell them that if they wanted union jobs, to take union jobs, but leave Stephen "out of it." This testimony is not corroborated by any employee.

[7] Curiously, Dudek testified that he did not talk to any employees about Stephen's statement about bribing employees. However, I credit Mazzeo, a witness unsympathetic to the Union and the General Counsel, that Dudek did tell him this.

[8] The language of Section 2(13) defining "agent" states that actual authorization or subsequent ratification of specific acts is not controlling in determining whether a person is an "agent."

Common law principles incorporate the principles of implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the agent to do the act in question, *Shen Automotive Dealership Group,* 321 NLRB 586, 593 (1996). Another way the Board has stated this principle is "whether under all the circumstances the employees would reasonably believe that [a person] was reflecting company policy and speaking and acting for management," *Community Cash Stores,* 238 NLRB 265 (1978).

The hearing officer's report, to which exceptions were not taken, establishes that Ed Dudek was a supervisor within the meaning of Section 2(11) of the Act. As set forth in the General Counsel's brief, this normally forecloses further inquiry as to his agency status, specifically whether the statements he made can be imputed to the Respondent. However, when a supervisor, such as Dudek, is actively involved on behalf of the Union, further inquiry is warranted as to whether he was acting for and on behalf of management when making statements that would otherwise violate Section 8(a)(1), *Indianapolis Newspapers, Inc.,* 103 NLRB 1750, 1751 (1953). *Montgomery Ward & Co., Incorporated,* 115 NLRB 645, 647-48 (1956).[9]

There is no question that generally Ed Dudek was an "agent" of Respondent. When he told employees to do work on the jobsite, they would reasonably believe that he was speaking for management. Mitchell Stephen even referred to Dudek as his business partner, although there is no evidence that Dudek had an ownership interest in Ace Heating.

An individual may be an agent of the employer for one purpose and not another, *Pan-Osten Co.,* 336 NLRB 305, 306 (2001). Normally, it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship, *Id.* However, this principle does not apply to an individual who is a statutory supervisor. Nevertheless, viewing the record as a whole, I conclude that in matters relating to the Union organizing drive, Ed Dudek was not acting as Respondent's agent.

Dudek signed a union authorization card in front of 6 of the unit employees who signed cards. Sarosy, the 7th unit member, was also aware of Dudek's support for the Union. Dudek facilitated the Union's contact with employees and exchanged text messages with Organizer Coleman as late as May 7.

None of the four employees, to whom the alleged threat was made on about May 14, made any comment to Dudek or Stephen about it. This is another consideration that leads me to conclude that they did not believe that Dudek was speaking on behalf of Stephen, or that Stephen had told Dudek to threaten them with job loss. Furthermore, assuming Dudek made such a statement, his motives are extremely suspicious. There is no reason why someone who wanted the Union to prevail would make such a statement to pro-union employees one week before the election.

[9] Also see *National Apartment Leasing,* 272 NLRB 197 (1984) in which the Board accepted as the law of the case the decision of the United States Court of Appeals for the Third Circuit in *NLRB v. Schroeder*, 726 F. 2d 967 (3d Cir. 1984). The Court held that whether a statutory supervisor's violative statements could be imputed to the employer was a rebuttable presumption.

The Union considered Dudek to be operating on its behalf and not on Respondent's. In filing objections, it argued that Dudek was an "employee" whose vote should be counted. However, it also contended that if he was determined to be a statutory supervisor that his conduct should be considered objectionable. I conclude that the Union expected Dudek to vote for union representation by Local 33 and its desire to impute his statements to Respondent was a fall-back position in the event its effort to overturn the challenge was unsuccessful.

Dudek was not acting as Respondent's agent when making all the statements alleged to have violated Section 8(a)(1). Therefore I dismiss all the complaint items predicated on statements he made to unit employees.

The General Counsel failed to establish that Respondent violated the Act in not granting employees a scheduled pay increase because of their support for the Union.

The only evidence supporting the General Counsel's allegations in complaint paragraph 12 is the testimony of Jimmy Mazzeo. Mazzeo testified that a week after the election, Mitch Stephen told him that he was not changing employee's compensation or giving raises until the issue of union representation was resolved. Thus, there is no evidence that Stephen was retaliating against any employee because of their union support. In this regard, I infer that Stephen was aware that Mazzeo no longer supported the Union prior to the election on May 21.[10]

Respondent's decision to delay raises does not violate the Act unless these raises were of the nature that Respondent was required to give out raises despite the pending objections. That would be the case only if these raises were given with such regularity that employees were expecting raises, or if the employer had informed the employees that they were getting raises prior to the filing of the representation petition, *DMI Distribution of Delaware,* 334 NLRB 409, 411 (2001); *B & D Plastics,* 302 NLRB 245 fn. 2 (1991); *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 353-354 (2003).

On the contrary, this record indicates the Respondent gave out wage increases in a "haphazard fashion." Thus, had it given raises during the critical period between the filing of the representation petition and the election, it would most likely have violated the Act and engaged in objectionable conduct warranting either a rerun of the election or a *Gissel* bargaining order. Once the election was over, with objections and challenges pending, Respondent granted raises at its peril. That is to say had the election been overturned and the Union certified, it would have been in violation of Sections 8(a)(5) and (1).[11]

Board law regarding an employer's unilateral changes during the period in which objections or ballot challenges are pending was summarized as follows in *Palm Beach Metro Transportation, LLC,* 357 NLRB No. 26 (July 26, 2011):

[10] Mazzeo called fellow employee Chris Sikora four days before the election and told Sikora to vote against union representation. Mazzeo also told Sikora that he would speak to Mitch Stephen about giving Sikora a raise, Tr. 289-90.

[11] An employer does not violate the Act it if tells employees that benefits previously provided in an indefinite manner will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference, *Village Thrift Store,* 272 NLRB 572 (1983).

> Absent "compelling economic considerations," an employer "acts at its peril" by unilaterally changing working conditions during the pendency of election issues and where the final determination has not yet been made. And where the final determination on the objections results in the certification of representative the Board will find the employer to have violated Section 8(a)(5) and (1) of the Act for having made such unilateral changes, *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974), *enf. denied on other grounds, NLRB v. Mike O'Connor,* 512 F.2d 684 (8th Cir. 1975).

Since the Union was not certified and will not be certified as a result of my decision, the *Mike O'Conner* principle has no relevance to this case. Thus, I find that Respondent did not violate the Act in delaying raises for unit employees or telling Jimmy Mazzeo that it was doing so.

The General Counsel's motion to amend alleging that Respondent violated the Act in giving two employees raises while objections were pending

The General Counsel also alleges, pursuant to a motion to amend the complaint, that Respondent violated the Act in granting raises to Sarosy and Corbin. Since I find that the General Counsel and the Union have not prevailed on proving objectionable conduct, such raises do not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

I also recommend that the Board certify the results of the May 21, 2014 election.

Dated, Washington, D.C., January 15, 2015.

Arthur J. Amchan
Administrative Law Judge

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.